

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re:

MDL Docket No: 08-MD-1958

Zurn Pex Plumbing Products
Liability Litigation

Judge Ann D. Montgomery

This Document Relates to All Actions

PRETRIAL ORDER NO. 3

1. SCOPE

1.1. This Order, issued pursuant to 18 U.S.C. § 1407(a), will govern the practice and procedure in: (1) those actions transferred to this Court by the Judicial Panel on Multidistrict Litigation, pursuant to its order of August 21, 2008; and (2) all related cases originally filed in this Court or transferred or removed to this Court.

1.2. This Order will also govern the practice and procedure in: (1) any “tag-along” actions transferred to this Court by the Judicial Panel on Multidistrict Litigation, pursuant to Rule 7.4 of the Rules of Procedure of that Panel, and (2) any related actions subsequently filed in this Court or transferred or removed to this Court.

2. COMPENSATION AND TIME AND EXPENSE RECORDS

2.1 Counsel who anticipate seeking an award of attorneys’ fees and reimbursement of expenditures from the Court must comply with the directives contained in The Manual for Complex Litigation, Fourth 40.23,

regarding the maintenance and filing of contemporaneous records reflecting the services performed and the expenses incurred.

2.2 Plaintiffs' Lead Counsel shall establish procedures for the documentation of time and expense incurred by plaintiffs' counsel for work done for the common benefit of the plaintiffs. Plaintiffs' Lead Counsel may also make assessments to the members of the Plaintiffs' Steering Committee for costs associated with the work done for the common benefit of the plaintiffs.

2.3 Plaintiffs' counsel intending to seek reimbursement of expenses incurred for the common benefit of the plaintiffs in this MDL are advised that the Court will not consider reimbursing unnecessary expenses such as first class airfare or inordinately expensive hotel rooms.

3. SCHEDULE FOR CLASS CERTIFICATION DETERMINATION

3.1 The issue of class certification shall be prepared for an early hearing. The discovery conducted by the parties for matters related to class certification shall comply with the Court's order in *Cox, et al. v. Zurn Pex, Inc., et al.*, Case No. 07-3652 (D. Minn.) [Docket # 22] until decision of the class certification issue or further order of this Court.

3.2 To facilitate early resolution of class certification issues and to focus additional efforts in this MDL, the Court will decide motions for certification in phases. Within 30 days of the date of this Order, Plaintiffs' Lead Counsel will identify the case(s) he proposes to be included in Phase

One and the scope of the proposed class(es) that Plaintiffs' Lead Counsel proposes to be included in Phase One.

3.3 The schedule for a class certification determination of the cases in Phase One is as follows:

Plaintiffs' Lead Counsel to identify case(s) to be considered in Phase One pursuant to ¶3.2	[30 Days from date of Order]
Discovery as to class certification terminates	June 15, 2009
Motions which seek to amend the pleadings or add parties prior to a class certification decision must be filed and the Hearing thereon completed on or before	June 15, 2009
All nondispositive Motions on matters pertaining to class certification shall be filed and the Hearing thereon completed prior to a class certification determination	July 15, 2009
Plaintiffs disclose experts and reports, if any, re: Phase One class certification	August 1, 2009
Defendants disclose experts and reports (including reports or proposed opinions of in-house witnesses), if any, re: Phase One class certification	September 1, 2009
Plaintiffs' rebuttal expert reports, if any, served on Defendants	October 1, 2009
Expert depositions for issues related to Phase One class certification completed	November 1, 2009
Class Certification Hearing	On or before December 30, 2009

3.4 The designation of experts, or any witness that will provide opinions or mixed fact and opinion testimony, must be accompanied by a report that complies with Fed. R. Civ. P. 26(a)(2)(B). This expert designation is only for the identification of experts on the issues submitted for Phase One class certification.

3.5 Plaintiffs and Defendants will each be allowed no more than 20 fact witness depositions, inclusive of those already taken in any matter transferred to this MDL as of the date of this Order, on issues submitted for Phase One class certification.

4. DEPOSITIONS

4.1 Deposition Notices.

4.1.1 All depositions in MDL-1958, except pursuant to Court order, will be noticed and conducted pursuant to Fed. R. Civ. P. 30. Such depositions may be cross-noticed in any similar Zurn PEX action pending in a state court.

4.1.2. Deposition notices shall state whether the deposition is to be videotaped and, if so, the business name and address of the videotape recorder.

4.1.3. Plaintiffs' counsel in any related federal action may suggest matters for inquiry in any deposition noticed in MDL-1958 by providing to Liaison Counsel a written list and brief explanation of such matter or matters.

Liaison Counsel is responsible for submitting these items to Plaintiffs' Lead Counsel.

4.2 Cooperation.

Counsels are expected to cooperate with, and be courteous to, all counsel and deponents. Behavior brought before this Court alleged to be contrary and so found, is subject to sanctions.

4.3 Scheduling.

4.3.1 Absent extraordinary circumstances, counsel shall consult with opposing counsel and proposed deponents in advance in an effort to schedule depositions at mutually convenient times and places.

4.3.2. Depositions must be noticed under Fed. R. Civ. P. 30 at least 20 calendar days in advance, with notice served upon Liaison Counsel or Defense Counsel (whichever applies) by facsimile or email and mail.

Service upon Liaison Counsel or Defense Counsel shall be deemed service upon all parties. A continued deposition may be resumed upon 10 days' notice.

4.4. Locations for Taking Depositions.

4.4.1. Unless otherwise agreed by Liaison Counsel, depositions of plaintiffs will take place in each plaintiff's home district.

4.4.2. Unless otherwise agreed by Defense Counsel, depositions of Defendants' employees (past and current) will take place in the district of the deponent's home or office location.

4.4.3. Unless otherwise agreed by Defense or Liaison Counsel, the deposition of an expert witness shall take place in the expert witness's home district.

4.5. Deposition Day.

Depositions shall not last longer than 7 hours of testimony absent agreement of the parties or good cause shown.

4.6. Attendance.

4.6.1 Who May be Present. Unless otherwise agreed to by Defense and Liaison Counsel, depositions may be attended only by the parties, the deponent, the deponent's attorney, attorneys of record in MDL-1958 or similar state Zurn PEX cases (including any employee or retained consultant of such attorney who is assisting in the litigation and whose presence is reasonably required by the attorney), in-house counsel for Defendants, the court reporter, and the videographer. Upon motion 10 days prior to the scheduled deposition, and for good cause shown, the Court may permit attendance by a person who does not fall within any of these categories.

4.6.2. Use of Confidential Documents. While a deponent is being examined about any document that is confidential because (i) Liaison and Defense Counsel have so agreed, (ii) a party has designated the document confidential pursuant to the Protective Order, or (iii) the Court has so ordered, attendance at that portion of the deposition by persons to whom

disclosure is not authorized by agreement of Liaison and Defense Counsel, the terms of the Confidentiality Order, or by court order shall be prohibited.

4.6.3. Unnecessary Attendance. Unnecessary attendance by plaintiffs' counsel is discouraged and may not be compensated in any fee application to the Court. Counsel who have only marginal interest in a proposed deposition or who expect their interest to be adequately represented by the Plaintiffs' Steering Committee should not attend.

4.7. Conduct of the Deposition.

Except by order of the Court, the following provisions shall apply at all depositions of fact witnesses:

4.7.1. Selection of Attorneys to Conduct Examination.

- (a) One attorney will conduct the principal examination of the deponent on behalf of (i) the Plaintiffs in any case that is part of this MDL; and (ii) one attorney will conduct the principal examination on behalf of Defendants. The attorney so designated by the Plaintiffs' Lead Counsel will coordinate with other plaintiffs' counsel reasonably in advance of the date scheduled for the deposition regarding the areas of examination in order to conduct a thorough examination.
- (b) In some depositions there may be sufficient divergence of positions among parties on the same side of the case such that additional examiners may be appropriate on non-redundant

(i.e., new) subject matters, in which event other attorneys will be permitted to examine deponents on non-redundant matters. The need for additional examiners and the non-redundant requirement will be strictly construed.

4.7.2. Objections

- (a) All objections as to relevance and admissibility shall be preserved for later ruling by the Court. Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to endorse a limitation on evidence directed by the court, or to present a motion.
- (b) As soon as any one attorney representing a party to this litigation states the word “objection,” all parties shall be deemed to have preserved all possible objections to the form of the question or the responsiveness of the answer. Counsel for other parties shall not repeat the objection. Only if an explanation for the basis of the objection is requested may counsel other than the first to object reiterate the objection and explain.

4.7.3. Directions Not to Answer; Suspension of a Deposition.

Directions to the deponent not to answer are improper except on the ground of privilege or to enable a party or deponent to present a motion for protective order on the grounds that it is being conducted in bad faith, or in such manner as to unreasonably annoy, embarrass, or oppress the party or the deponent.

4.7.4. Objections to Documents. Objections to the admissibility of documents are not waived and are reserved for later ruling by the Court or trial judge.

4.7.5. Sequence of Examination – Depositions Taken by Plaintiffs.

Questioning at the depositions to be taken by plaintiffs will be conducted in the following sequence:

- (1) the primary examiner selected by Plaintiffs' Lead Counsel;
- (2) other MDL-1958 plaintiffs' attorneys on non-redundant matters;
- (3) the primary examiner selected by Defendants;
- (4) individual counsel for the deponent, if any;
- (5) any re-cross or re-direct by 1-4, supra.

4.7.6. Sequence of Examination – Depositions Taken by Defense Counsel.

Questioning at the depositions to be taken by defendants shall be conducted in the following sequence:

- (1) the primary examiner selected by Defendants;
- (2) the primary examiner selected by Plaintiffs' Lead Counsel;

- (3) any other MDL-1958 plaintiffs' attorney on non-redundant matters;
- (4) individual counsel for the deponent, if any;
- (5) any re-cross and re-direct by 1-4, supra.

4.8. Documents.

4.8.1. Production of Documents. Witnesses subpoenaed or noticed to testify and to produce documents shall be noticed and served with the subpoena or deposition notice and document request at least 30 days before the scheduled deposition. This provision shall not supersede any preexisting agreement or order governing which documents should be produced and/or when.

4.8.2. Copies. Extra hard copies of documents about which counsel expect to examine the deponent should be provided to the reporter, primary counsel for the parties, the deponent, and deponent's counsel during the course of the deposition.

5. SUPPLEMENTAL DEPOSITIONS.

5.1. The parties shall attempt to avoid repetitive and redundant questioning of witnesses. To that end:

- (a) A party not present at a deposition taken during this MDL proceeding may, within 90 business days after the completion of the deposition, upon a good faith determination that further inquiry of the deponent is necessary, notify Liaison Counsel

that it will move this Court for an order allowing resumption of the deposition.

- (b) A party whose case is transferred to MDL-1958 after a deposition has been taken, and who did not receive service of a cross-notice, may within 60 days of the Transfer Order, and upon a good faith determination that further inquiry of the deponent is necessary, notify the other parties that it will move the this Court for an order allowing resumption of the deposition.
- (c) The notice shall identify with specificity those areas where the party believes further examination is necessary, state how the MDL-1958 deposition (and other depositions of the witness placed in the depository) was inadequate or incomplete, state whether the movant has conferred with the primary examiner regarding these supplemental areas of examination, and demonstrate that further examination would be relevant and non-redundant. The parties shall meet and confer in an effort to resolve whether the witness will be made available for a supplemental deposition.
- (d) If no resolution is reached, the party seeking the supplemental deposition may move the Court for an order allowing resumption. The motion must be limited to 3 pages. Within 14

days of the filing of any such motion, any party may file an opposition to the motion and seek a protective order prohibiting the supplemental deposition on the grounds that the MDL-1958 deposition (or any other deposition of the witness in the depository) adequately covered the area or areas sought to be explored in the supplemental deposition or that the testimony sought is not relevant and non-redundant. Oppositions to such motions shall be limited to 3 pages.

- (e) No further or supplemental deposition will be permitted (i) by any party having received notice in MDL-1958 of the original deposition or (ii) by any party represented by counsel on the Plaintiffs' Steering Committee (where the original deposition was taken by a member of the Committee), except upon order of the MDL-1958 Court on good cause shown.
- (f) The supplemental deposition shall be treated as the resumption of the deposition originally noticed. During the resumed deposition, any other party may conduct further examination of the witness only with regard to new subject areas authorized by the order allowing the resumed deposition. The resumed deposition shall be taken at the same location as the initial deposition unless otherwise agreed to by the parties and the deponent.

6. STATUS CONFERENCES

The Court shall convene status conferences on a regular basis to be conducted every other month. The next regularly scheduled status conference will be held on **April 21, 2009, at 9:00 a.m.** All status conferences shall take place in the Courtroom of Judge Ann D. Montgomery, Courtroom 13W, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota. Counsel for each side shall meet and confer in advance of each status conference and submit to the Court within three business days before each status conference the following: (1) a report setting forth a summary of the activities of the parties since the last status conference; (2) a joint agenda listing matters to be considered by the Court at the conference; and (3) a brief – one to two paragraph – summary of the party positions as to any disputed issues listed on the agenda. This is intended to facilitate the orderly handling of this litigation and is not intended as a substitute for motion practice where necessary.

8. This Order will be adjusted as necessary to allow for orderly discovery.

IT IS SO ORDERED this 24th day of February, 2009.

s/Ann D. Montgomery

Judge Ann. D. Montgomery
United States District Court